

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
WCS LICENSE SUBSIDIARY, LLC)	WT Docket No. 05-256
)	File No. 0002240823
Application for Transfer of Control from WCS)	
Wireless, Inc. to XM Satellite Radio Holdings Inc.)	

REPLY

The Wireless Communications Association International, Inc. (“WCA”), by its attorneys and pursuant to Section 1.939 of the Commission’s Rules, hereby replies to the filings by WCS Wireless License Subsidiary, LLC (“WCS Wireless License Subsidiary”) and XM Satellite Radio Holdings Inc. (“XM”) opposing WCA’s petition to deny in part the application for Commission consent to the transfer of control of WCS Wireless License Subsidiary from WCS Wireless, Inc. (“WCS Wireless”) to XM (the “Transfer of Control Application”).¹

WCS Wireless License Subsidiary and XM rely on obfuscation and mischaracterization to avoid the simple fact that is at the heart of WCA’s position in this proceeding – *there is no public interest justification for allowing XM to assume WCS Wireless, LLC’s pending applications requesting waiver of Section 27.50(a) without first (i) requiring the submission of amendments reflecting the change in the identity of the applicant and explaining why XM requires a waiver and; (ii) then affording the public*

¹ WCS Wireless, Inc., Transferor, and XM Satellite Radio Holdings Inc., Transferee, Application for Assignments of Authorization and Transfers of Control, File No. 0002240823, at Ex. 1 n.1 (filed July 15, 2005) [“Transfer of Control Application”].

*notice of those major change amendments and an opportunity to comment!*² This is the process contemplated by Sections 1.927(h) and 1.933(b) of the Commission's Rules, and XM has failed to produce any sound reason why it should be exempted. Indeed, the oppositions filed by WCS Wireless License Subsidiary and XM completely ignore Sections 1.927(h) and 1.933(b) – they are not discussed at all in either filing. Why? Perhaps because XM and WCS Wireless License Subsidiary know full well that XM cannot possibly justify a waiver that will increase by 6 dB the level of adjacent channel interference suffered by other Wireless Communications Service (“WCS”) licensees.³

The obfuscation starts with assertions that WCA has somehow acted improperly by even raising WCS Wireless' pending applications seeking Section 27.50(a) waivers in this proceeding.⁴ Of course, XM and WCS Wireless License Subsidiary conveniently

² A prime example of the mischaracterizations that infect WCS Wireless License Subsidiary's filing is its assertion that “[t]he public was given notice of the Waiver at least twice: first in the Public Notice announcing the filing of the Waiver [footnote citing Public Notice, DA 05-1662 (June 15, 2005)], then in the transfer Application Public Notice [footnote citing Report No. 2209, File Nos. 0002240823, et al, rel. July 20, 2005].” Opposition of WCS Wireless License Subsidiary, LLC to Petitions to Deny, File No. 0002240823, at 6 (filed Aug. 17, 2005) [“WCS Wireless License Subsidiary Opposition”]. In fact, *the latter Public Notice contained no mention whatsoever of the fact that there was a request to assign the Waiver Request to XM and for a waiver of Section 1.927(h) and 1.933(b)*. This belies the assertion that “[a]nyone with interest in the Waiver would have learned of the contemplated merger.” *Id.*

³ Indeed, this is likely why, despite seeking an exemption from Sections 1.927(h) and 1.933(b), the Transfer of Control Application represents to the Commission in responding to Question 5(a) of FCC Form 603, that the parties are not seeking any waiver of the rules. See Petition of the Wireless Communications Ass'n Int'l, Inc. to Deny, File No. 0002240823, at 3 (filed Aug. 3, 2005) [“WCA Petition”]. XM has not even seriously attempted to refute WCA's argument that “[t]he Commission should not allow XM to make such a representation to the Commission and to members of the public in the application form, then bury a waiver request in a footnote to an exhibit.” *Id.*

⁴ See WCS Wireless License Subsidiary Opposition at 5; Consolidated Opposition of XM Satellite Radio Holdings Inc. to Petitions to Deny, WT Docket No. 05-256, File No. 0002240823, at 17 (filed Aug. 17, 2005) [“XM Opposition”]. Thus, when XM contends that “WCS [*sic* should read “WCA”] does not oppose the transfer of WCS Wireless' licenses to XM, which is the only issue before the Bureau in this proceeding,” it is only half right. XM Opposition at 17 (citation omitted). While WCA does not oppose the acquisition by XM of control over WCS Wireless License Subsidiary, it is misleading in the extreme for XM to pretend that its request for an exemption from the requirements of Sections 1.927(h) and 1.933(b) is not also before the Commission.

ignore that it was they, not WCA, that introduced WCS Wireless' pending waiver request into this transfer of control proceeding when they buried the following in a footnote to the Transfer of Control Application:

WCS License Sub and XM request that FCC approval of this transfer application include authority for XM to acquire control of this waiver application to the extent it is still pending at the time this transfer is consummated. Moreover, XM requests an exemption from Sections 1.927(h) and 1.933(b) of the FCC's rules to the extent XM is required to file an amendment to this pending waiver application to reflect consummation of this transfer of control.⁵

Thus, XM and WCS Wireless License Subsidiary have no one to blame but themselves for the intermingling of the two proceedings. Had XM been willing merely to amend the pending applications seeking waiver of Section 27.50(a) and to allow the public notice and comment process spelled out in Sections 1.927(h) and 1.933(b) to run its course, WCA would not be participating in this proceeding.

XM would have the Commission believe that "[t]he fact that XM rather than WCS Wireless will operate base stations at an average power specification is not of decisional significance in the waiver proceeding."⁶ What is and is not of decisional significance is, of course, for the Commission to decide. WCA certainly suspects that who operates the stations will prove not to be of decisional significance, *because neither WCS Wireless nor XM can justify a waiver that subjects adjacent channel licensees to a 6 dB increase in out-of-band emissions*. However, because the rationale given by WCS Wireless for a waiver (the need to spur investment in WCS Wireless) will clearly not be

⁵ Transfer of Control Application, Ex. 1 at 1 n.1 (citation omitted).

⁶ XM Opposition at 18.

applicable to XM upon its acquisition of control over the WCS licenses,⁷ neither the Commission nor WCA can know what is and is not of decisional significance until XM explains why it believes it requires a waiver of Section 27.50(a). Section 1.925 of the Commission Rules requires that one seeking a waiver must provide “a complete explanation as to why the waiver is desired,”⁸ and when XM amends the pending applications to reflect that it is now the applicant and to explain why it needs a waiver, the Commission will be able to determine what is and what is not of decisional significance.

WCS Wireless License Subsidiary distorts WCA’s position when it goes to great lengths to argue that “there is no causal relationship between the merger here at issue and any possible harm to WCA.”⁹ Of course, WCA has never said there is a causal link between harm to its WCS members and the merger, and thus has not opposed XM’s acquisition of WCS Wireless License Subsidiary. What WCA has opposed is XM’s effort to avoid public scrutiny of XM’s purported need for a waiver of Section 27.50(a) without complying with the requirements of Sections 1.927(h) and 1.933(b). Given the record developed in response to the Section 27.50 waiver, it is pure sophistry for WCS Wireless License Subsidiary to suggest that WCA and its members will not suffer harm if the Commission waives Section 27.50(a) without requiring XM to explain why it desires to impose 6 dB of additional in out-of-band emissions on other WCS licensees and then

⁷ See Reply of the Wireless Communications Ass’n Int’l, Inc., DA 05-1662, File No. 0002109551 *et al.*, at 1-2; Letter from Paul J. Sinderbrand, Counsel to WCA, to Marlene H. Dortch, Secretary, FCC, DA 05-1662, at 4 (filed Aug. 22, 2005).

⁸ See 47 C.F.R. § 1.925(c). See also WCA Petition at 4.

⁹ WCS Wireless License Subsidiary Opposition at 5.

subjecting that explanation to the public notice and comment envisioned by Sections 1.927(h) and 1.933(b).

Moreover, it defies credulity for WCS Wireless License Subsidiary to claim that “there has been no change in the WCS Wireless business plan for one-way datacasting service.”¹⁰ Like WCA, the Commission must wonder how WCS Wireless is going to be implementing its data-casting plan when WCS Wireless has decided to transfer control over WCS Wireless License Subsidiary – which holds the WCS licenses – to XM? As WCA has stressed both here and in the proceedings involving the waiver request, it is now incumbent upon XM to demonstrate why it requires a waiver of Section 27.50(a)(3).¹¹ WCS Wireless claimed it needed a waiver because “[w]ithout waiver . . . [WCS Wireless] believes it will be difficult going forward to attract investment” in its WCS business plan.¹² If XM requires a waiver, it certainly is not for the reason cited by WCS Wireless.

Perhaps recognizing that XM cannot justify its requested exemption from Sections 1.927(h) and 1.933(b), WCS Wireless License Subsidiary and XM attempt to avoid a ruling on the merits of WCA’s position by raising a series of procedural objections. For example, they grossly mischaracterize Section 309(d)(1) of the Communications Act of 1934 and Section 1.939(d) of the Commission’s Rules by

¹⁰ *Id.* at 4-5.

¹¹ See Reply of Wireless Communications Ass’n Int’l, Inc., DA 05-1662, at 2 n.6 (filed July 15, 2005) (“[i]f, as WCA suspects it will, XM desires to operate its newly-acquired WCS authorizations at a higher power than permitted under Section 27.50(a), then XM will have to make its own case, explaining why it cannot operate in compliance with the current rules and explaining how its proposal will be benign towards other WCS licensees.”); WCA Petition at 5.

¹² WCS Wireless, LLC, Amended Request for Waiver of Section 27.5, File Nos. 0002109551 *et al.*, at 12 (filed May 16, 2005).

asserting that WCA's petition to deny is procedural infirm because it was not accompanied by an affidavit establishing standing.¹³ Contrary to what WCS Wireless License Subsidiary asserts, the filing of an affidavit is *not* an "absolute."¹⁴ To the contrary, no affidavit is required when the facts upon which the petitioner bases its filing are matters of which the Commission can take official notice.¹⁵ And that is clearly the case here.

WCA's standing to seek denial of the request to allow XM to replace WCS Wireless in connection with the waiver request without public notice or an opportunity to comment are clearly established in WCA's petition through the recitation of facts of which the Commission can take official notice. Specifically, WCA noted that:

WCA has filed various pleadings in response to the Commission's request for comment on the Waiver Request and has demonstrated, *inter alia*, that a grant of the Waiver Request will subject adjacent channel WCS licensees to interference. See Opposition of the Wireless Communications Ass'n Int'l to Amended Request for Waiver, DA 05-1662 (filed July 5, 2005); Reply of the Wireless Communications Ass'n Int'l, DA 05-1662 (filed July 15, 2005) ["WCA Reply Comments"]; Letter from Paul J. Sinderbrand, Counsel, Wireless Communications

¹³ See WCS Wireless License Subsidiary Opposition at 3; XM Opposition at 18 n.47.

¹⁴ WCS Wireless License Subsidiary Opposition at 3.

¹⁵ See, e.g., *Application of Mobex Network Services, LLC*, Order, 18 FCC Rcd 12305, 12307 n.16 (2003) ("Mobex also argues that Havens failed to comply with the 47 C.F.R. §1.939(d) requirement that allegations of fact in a petition to deny be supported by affidavit. [] No affidavit is needed in this case, however, because all of the operative facts - largely regarding what Mobex filed in 2000 and 2002 - are of the type of which we can take official notice. See 47 C.F.R. §1.939(d)."); *Channel 32 Hispanic Broadcasters, Ltd.*, Order, 15 FCC Rcd 22649, 22652 (2000) ("Section 309(d)(1) does not, however, require that facts 'of which official notice may be taken' be supported by affidavit. [] Based upon our review of the pleadings, it is clear that the facts alleged in the petitions regarding the processing of Channel 32's application are independently supported by Commission records, and accordingly, no supporting affidavit is required."). See also *Ft. Myers Broadcasting Company*, Letter, DA 04-3197 (rel. Oct. 06, 2004); *WHDH, Inc.*, Decision, 16 FCC 2d 29, 97 (1969); *Amendment of Part 73.202(b)*, Report and Order, 12 FCC Rcd 3215, 3216 n.4 (1997).

Ass'n Int'l, to Marlene H. Dortch, Secretary, FCC, DA 05-1662 (filed Aug. 1, 2005).¹⁶

Given that WCA is a participant in the proceeding surrounding the Section 27.50(a) waiver request, it is self-evident that WCA and its members will suffer harm if XM is permitted to step into the shoes of WCS Wireless without amending the pending applications to explain why XM requires a waiver of Section 27.50(a) and then permitting WCA (and other members of the public) notice and an opportunity to comment. WCS Wireless License Subsidiary and XM cannot seriously contend that the Commission is precluded from taking official notice of WCA's prior filings with the Commission in opposition to the Section 27.50(a) waiver request given the long line of cases in which the Commission routinely took official notice of filings in proceedings before it.¹⁷

Indeed, WCS Wireless License Subsidiary is so desperate to avoid Commission scrutiny of the issues raised by WCA that it contends that the Commission should not even consider WCA's filing as an informal complaint because there are formal procedures in place for the filing of petitions to deny and it would undermine those procedures to consider WCA's filing informally.¹⁸ In so doing, WCS Wireless License Subsidiary forgets that the Commission has often treated procedurally-infirm petitions to deny against assignment of transfer applications as informal objections.¹⁹ Of course, the

¹⁶ WCA Petition at 1-2 n.3.

¹⁷ See *infra*, note 15.

¹⁸ See WCS Wireless License Subsidiary Opposition at 5.

¹⁹ See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, Memorandum Opinion & Order, 19 FCC Rcd 21522, 21547 n.196 (2004) ("even were [the Commission] to conclude that some or all of the Petitioners lack standing, we would still have discretion to consider their (continued on next page)

Commission need not address the issue, as WCA has standing, but even if it did not, precedent dictates that WCA's filing be treated as an informal objection.

In the end, the Commission must ask itself one question – why is XM fighting so hard against having to explain its purported need for a waiver of Section 27.50(a) and then having that explanation subject to notice and public opportunity to comment? The answer, WCA submits, is that XM knows that it cannot justify a waiver under Section 1.925 of the Commission's Rules because a grant of the waiver will subject other WCS licensees to a substantial increase in interference from out-of-band emissions.

WHEREFORE, for the reasons set forth in WCA's Petition to Deny, the Commission should dismiss the applications seeking waiver of Section 27.50(a) as moot. Should the Commission nonetheless permit assignment of those applications, the Commission should deny XM's request for an exemption from Sections 1.927(h) and 1.933(b) of the Commission's Rules. Instead, XM should be required to file a major change amendment to the pending applications to reflect the applicant's change in identify and to establish why XM should be entitled to a waiver of Section 27.50(a).

pleadings as informal objections.” citing *Pacific Gas and Electric Company*, Memorandum Opinion and Order, 18 FCC Rcd 22,761, n.47 (2003); *Application of Tabback Broadcasting Company for Renewal of License of Station KAZM (AM), Sedona, Arizona*, Memorandum Opinion and Order, 15 FCC Rcd 11899 (2000) (treating petition to deny transfer of control as informal objection); *Applications of MLGAL Partners, L.P., (Transferor) and Evergreen Media Corporation (Transferee)*, Memorandum Opinion and Order, 10 FCC Rcd 5653 (1995) (treating petition to deny transfer of control into informal objection where party lacked standing); *Nextel License Holdings 4, Inc.*, 17 FCC Rcd 7028, 7033 (2002) (noting that there is no standing requirement to file an informal objection)). See also *Application of MCI Communications Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 1072, 1074 (1994); *Infinity Broadcasting Corp. of California*, Memorandum Opinion and Order, 10 FCC Rcd 9504, 9505-6 (1995).

That amended waiver request should then be placed on public notice to allow for comment by interested parties, as contemplated by Sections 1.927(h), 1.929(a)(2) and 1.933(b) of the Commission's Rules.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: /s/ Paul J. Sinderbrand
Paul J. Sinderbrand
Nguyen T. Vu

Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037-1128
202.783.4141

Its attorneys

August 29, 2005

CERTIFICATE OF SERVICE

I, Michelle A. Bynum, hereby certify that on this 29th day of August, 2005 I served the foregoing "Reply" by depositing true copies thereof with the United States Postal Service, first class postage pre-paid and addressed to the following:

Scott Donohue
WCS Wireless License Subsidiary, LLC
c/o Resident Agents
100 East William Street, Suite 204
Carson City, NV 89701

Thomas Gutierrez
Lukas, Nace, Gutierrez, & Sachs, Chartered
1650 Tysons Blvd., Suite 1500
McLean, VA 22102

William Bailey
XM Satellite Radio Holdings Inc.
1500 Eckington Place, NE
Washington, DC 20002

Bruce Jacobs
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037

Best Copy and Printing, Inc.*
445 Twelfth Street, SW
Room CY-B402
Washington, DC 20554

Kathy Harris**
Erin McGrath**
Federal Communications Commission
Mobility Division
445 Twelfth Street, SW
Washington, DC 20554

/s/ Michelle A. Bynum
Michelle A. Bynum

**Via Hand Delivery*

***Via E-Mail Delivery*